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LIM KONG FAI v. KOEK TIANG KUNG

HIGH COURT MALAYA, SHAH ALAM
MUNIANDY KANNYAPPAN J
[CIVIL APPEAL NO: BA-12ANCC-18-03-2021]
26 OCTOBER 2022

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Abstract – *It behoves the plaintiff to inquire and verify the name and identification of the correct defendant before suing. To attribute the blame on the defendant once the plaintiff had made an error as to the correct defendant to sue, is misplaced and any judgment obtained in the plaintiff's favour is void ab initio and is unsustainable.*

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CIVIL PROCEDURE: *Judgments and orders – Amendment – Application under O. 20 r. 11 of Rules of Court 2012 – Application to alter originally named defendant – Whether implied that wrong defendant sued and judgment obtained against wrong person – Whether clerical mistake or accidental slip, error or omission justifying amendment – Whether judgment could be enforced – Whether judgment void ab initio and ought to be set aside*

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A judgment in default of appearance ('JID') was obtained against Roger Lim Kong Fai, identification no. 1736503D pursuant to a writ of summons and statement of claim ('SOC') issued against him. The JID was a final judgment against the defendant. The plaintiff later moved the Sessions Court under O. 20 r. 11 of the Rules of Court 2012 ('ROC') to amend the writ and SOC, as well as the JID, to alter the originally named defendant, Roger Lim Kong Fai with identification no. 1736503D, with Lim Kong Fai with identification no. S1736530D. The application was allowed by the Sessions Court Judge ('SCJ') and hence, this appeal.

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Held (allowing appeal with costs):

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(1) The JID obtained has to relate back to the writ and SOC against that defendant who is sued and not any other individual who is not sued. The amendment pertained to material alteration to the name of the defendant and his identification number. The only implication was that a wrong defendant was sued in the Sessions Court and consequently, the JID was wrongly obtained against him and hence, unsustainable. The plaintiff was at liberty to only enforce the money judgment obtained against Roger Lim Kong Fai with identification no. 1736503D and not to enforce it against Lim Kong Fai with identification no. S1736530D. The said judgment was liable to be set aside as it was void *ab initio*. It was not a clerical mistake nor an accidental slip, error or omission justifying an amendment under O. 20 r. 11 of the ROC. (paras 8 & 9)

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(2) There was a miscarriage of justice perpetrated on Lim Kong Fai when the ROC *vide* O. 1A had specified in absolute terms that the SCJ, in administering the ROC, shall have regard to the overriding interest of justice, which included that Lim Kong Fai was to be accorded the right to be heard and to defend a civil action, if properly brought against him. The SCJ had failed to consider the pivotal issue of whether the plaintiff sued the correct defendant. The JID obtained against Roger Lim Kong Fai could not be amended merely to extend its enforceability to Lim Kong Fai, without according to him a right to be heard. Thus, the decision of the SCJ was plainly wrong and smacked on an appealable error, justifying the intervention of this court. (para 13)

Case(s) referred to:
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Lim Kean v. Choo Koon [1969] 1 LNS 94 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 13 r. 1(1), O. 19 r. 2(1), O. 20 rr. 5(1), (3), 11, O. 42 r. 5, O. 45 r. 9

For the appellant/defendant - Justin Chin; M/s Justin Chin
For the respondent/plaintiff - Manpal Singh & Kiranjit Kaur; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners

Reported by S Barathi

JUDGMENT

Muniandy Kannyappan J:

Background Facts

[1] The issue in this appeal revolves around a writ issued against the defendant Roger Lim Kong Fai, endorsed with claim for liquidated demand only, for an amount of RM800,000. Pursuant to O. 13 r. 1(1) of the Rules of Court 2012 (ROC), where a writ is endorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by that writ in respect of the demand and for costs. Reference to that defendant simply means strict adherence to the writ and statement of claim against that defendant who is cited and identified in the writ and statement of claim and no other defendant. Likewise is also the rule in respect of default of pleadings, as in O. 19 r. 2(1), which reads where the plaintiff's claim against a defendant is for a liquidated demand only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed under the ROC for service of the defence, enter judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs. These rules sync with the trite principle

of law, before an action is commenced, a plaintiff who intends to institute a civil action must determine who is the defendant to be sued; his cause of action which consists of every material fact, which is necessary to be proved by him to obtain a judgment or order from the court against that defendant and not any other (See: *Lim Kean v. Choo Koon* [1969] 1 LNS 94; [1970] 1 MLJ 158); subject matter of the action and remedy required. In a nutshell, the name and identity of the defendant sued is vital to the claim by the plaintiff. It is so, as if the plaintiff succeeds in proving a case against that defendant or by default of appearance or pleading by defendant, judgment could be ordered against that defendant, and plaintiff could enforce the said judgment against that defendant. (See generally O. 45 ROC, save for O. 45 r. 9 ROC).

Amendment Of Pleading And Judgment

[2] If for some legitimate reason, an amendment of pleading is necessary to correct the name of a party, including the defendant, it may be allowed, notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party; if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to identity or the person intending to be sued. But such an amendment may be allowed only with leave of court, so as to accord right to be heard by the intended defendant. (See: O. 20 r. 5(1) and (3) ROC). It has to be reiterated, that amendment envisaged, relates to amendment of pleadings, including writ and statement of claim and not judgment.

[3] Easing back into facts of the present case, pursuant to writ of summons and statement of claim (SOC) issued against Roger Lim Kong Fai with identification card no: 1736503D, judgment in default of appearance (JID) was obtained against him. For all intents and purposes, the said JID is a final judgment against defendant, Roger Lim Kong Fai and no one else. The judgment subsists against him, as it has not been set aside.

Effect Of Amendment

[4] Later, the plaintiff sought leave to amend the writ and SOC as well as JID obtained against defendant. Amendment is to the material part of the pleading as well as judgment, wherein, name of the defendant and his identification number is sought to be amended. It is noteworthy, amendment of the writ and SOC is only sought after obtaining JID and not before as required under O. 20 r. 5(3) ROC.

[5] The amendment sought introduces a material alteration to the JID obtained, altering the JID against defendant, Roger Lim Kong Fai with identification number 1736503D to Lim Kong Fai with a Singapore passport number S1736530D. Thus, the amendment pertains not only to name of defendant but also his identification number. With the amendment, defendant named would be a different individual altogether with another name and identification number.

[6] So, the defendant cited in the original writ and SOC as well as JID is altered. It is not anymore against that defendant, Roger Lim Kong Fai with identification number 1736503D, as named in the writ and SOC, but another individual, Lim Kong Fai with identification number S1736530D. This is inconsistent with O. 42 r. 5 as well as Form 75 ROC which renders, the plaintiff has to draw out the JID in an action for liquidated demand against the defendant cited in the writ and SOC and not any other defendant.

[7] The Sessions Court, being the court of original jurisdiction was moved under O. 20 r. 11 ROC for the said amendment. As alluded to earlier, O. 20 ROC pertains to amendment to pleadings save for O. 20 r. 11 which is an enabling provision for an amendment of judgment, but only in limited circumstances. It is only to correct a clerical mistake, or error arising thereon from any accidental slip or omission. So, essentially only an accidental slip, clerical mistake or error and omission could be corrected in a judgment. Thus, pivotal issue in this case, is amending name of the defendant from Roger Lim Kong Fai with identification number 1736503D to Lim Kong Fai, with identification number S1736530D, results from a clerical mistake, an accidental slip, error or omission.

[8] Obviously, answer is in the negative, as the amendment pertains material alteration to name of the defendant and his identification number. The only implication is a wrong defendant had been sued in the Sessions Court and consequently JID was wrongly obtained against him. He is not the intended defendant to be sued by plaintiff. Thus, the plaintiff is now at liberty to only enforce the money judgment obtained against Roger Lim Kong Fai with identification number 1736503D and not to enforce it against Lim Kong Fai with identification number S1736530D. This is because, the JID obtained has to relate to the writ and SOC against defendant, Roger Lim Kong Fai and no one else.

[9] Gleaning from circumstances of the case, the amendment sought, is a tactical move to sustain an enforcement action against Lim Kong Fai and not Roger Lim Kong Fai, when intention at point of obtaining JID is for Roger Lim Kong Fai to pay the sum claimed. Thus, it is apparent, the JID obtained is unsustainable, as it does not relate back to the original writ of summons and SOC filed against Roger Lim Kong Fai with identification number 1736503D. To reiterate, it is settled law, JID obtained has to relate back to the writ and SOC against that defendant who is sued and not any other individual who is not sued. Moving the Sessions Court to alter name and identification number of the defendant, indicates plaintiff has sued the wrong defendant and obtained JID against him. The said judgment is in fact liable to be set aside as it is void *ab initio*. Legally, there has been a material error committed by the plaintiff when he sued the wrong defendant with a wrong identification number. It is not a clerical mistake nor an accidental slip, error

A or omission, justifying an amendment under O. 20 r. 11 ROC. The plaintiff is left without an alternative but to reinvent the wheel, by restarting the litigation process against the correct defendant.

[10] Bereft of all arguments advanced on service of writ and SOC; that defendant is aware of the subject matter of claim by plaintiff; the fact remains B plaintiff has sued the wrong defendant, thus disentitled to obtain JID against him.

Analysis And Conclusion

[11] The amendment sought and allowed by the Sessions Court Judge (SCJ) C has a prejudicial effect on Lim Kong Fai, who was not sued in the first place, but has a JID against him to be dealt with. He has been denied of his right to be heard, thus offending the rules of natural justice. If he is correctly sued, he would have the opportunity to adhere to the due process of law by either submitting or not submitting to jurisdiction of the court; entering appearance D and filing defence to the writ and SOC, if it is properly served on him. It is also noteworthy, the original writ and SOC against Roger Lim Kong Fai was not served on him personally but *vide* substituted service by registered post.

[12] Ensuing from the above, in a nutshell:

E (i) The plaintiff has sued the wrong defendant.

(ii) Although it is claimed by the plaintiff, to be a misnomer, the fact remains a wrong defendant with wrong identification number has been sued.

(iii) The plaintiff ought to have verified as to the correct name and F identification number of the defendant before suing.

(iv) It is his onerous duty to do so.

(v) Just as the plaintiff has verified the correct name of defendant and his identification number by undertaking a search on the property of the G defendant at the Majlis Bandaraya Petaling Jaya before applying to the court to amend the writ, SOC and JID, he ought to have done so before suing.

(vi) When suing, the plaintiff cannot rely on the representation made by defendant, Roger Lim Kong Fai *vide* letter dated 8 August 2017, H purportedly pointing to an acknowledgement of return of monies owed to plaintiff; he is willing to part from his property, a house at Damansara as security for the loan taken; issuance of post-dated cheques implying repayment of the loans taken. Reliance on such a letter and facts only goes towards sustainability of the cause of action I against defendant but does not entitle the plaintiff to sue Roger Lim Kong Fai as the defendant, but to embark on an inquiry and

verification if his name and identification number is correct and in fact, belongs to Lim Kong Fai, the intended defendant. Moreover, from the view point of litigation, author of the purported letter, would also have his own narrative of the events that had taken place pertaining transaction in issue. However, such factual matrix is only relevant for liability of the correct defendant, if sued.

(vii) Thus, after suing a wrong defendant Roger Lim Kong Fai and obtaining JID against him, the plaintiff cannot now as a bolt from the blue amend the writ, SOC and JID obtained to Lim Kong Fai when the intention was to sue Roger Lim Kong Fai and not Lim Kong Fai. Also, to attribute the blame on to the defendant, that he had perpetrated the error committed by the plaintiff is misplaced, as it behoves the plaintiff to inquire and verify name and identification of the correct defendant, before suing.

(viii) The error committed by the defendant is not a misnomer, but a material one. The writ and SOC were not issued and served on Lim Kong Fai in the first place, but to Roger Lim Kong Fai with a different identification number. To turn the table now against Lim Kong Fai is injustice, when he was not even cited and sued as a defendant, but has to face the proverbial music, as he has a JID against him to be met.

[13] By allowing the application to amend, the SCJ has erred in law. Her findings – "defendan sememangnya sedar bahawa namanya juga dikenali sebagai Roger Lim Kong Fai" and "pindaan-pindaan yang dibuat tidak prejudiskan defendan kerana pindaan tersebut tidak menukar entiti yang baru dan juga tidak mengubah fakta yang diplidkan.", are premature in the absence of facts in support. There is no iota of evidence to support that Lim Kong Fai is also known as Roger Lim Kong Fai. What then about the wrong identification number? Since the name and identification number differs, in law they are two distinct individuals. It is also apparent, the SCJ tends toward the argument advanced by the plaintiff but has treated argument by defendant *en passant*. In sum total, the SCJ had failed to consider a pivotal issue in this case, which is, has the plaintiff sued the correct defendant? In the premise, JID obtained against Roger Lim Kong Fai cannot be amended merely to extend its enforceability to Lim Kong Fai, without according to him right to be heard. For the reasons alluded to above, the plaintiff in suing the wrong defendant, cannot justify the end with an unfounded ground, that the error occasioned was perpetrated by Roger Lim Kong Fai, when it is duty of the plaintiff to sue the correct defendant. By amending the writ, SOC and judgment, Lim Kong Fai is also deprived of raising defence on the merits, which he is entitled to as of right. Therefore, there has been miscarriage of justice perpetrated on Lim Kong Fai, when the ROC *vide* O. 1A has specified in absolute terms, the SCJ when administering Rules of Court, shall have

A regard to the overriding interest of justice, which includes, Lim Kong Fai to be accorded the right to be heard and defend a civil action, if properly brought against him. Thus, decision by the SCJ was plainly wrong and smacks on an appealable error, justifying appellate intervention by this court. (See: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] B 2 MLJ 97).

[14] In the upshot, the appeal by the defendant is allowed with costs of RM3,500 to be paid to him subject to an allocator fee.

Appeal allowed. Order by Sessions Court to amend writ, statement of claim and judgment in default of appearance is set aside.

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